



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 44 of 2006

REPUBLIC..... APPLICANT

VERSUS

STEPHEN KARIUKI NDIRITU.....1ST DEFENDANT

NANCY MUHONJA AVURARA.....2ND DEFENDANT

JUSTUS MUTWIRI KIRUGARA.....3RD DEFENDANT

RULING

This ruling relates to a preliminary objection that was filed by Mr. Mbaluka on behalf of all the three accused persons. The said application was filed on 21st April, 2008. After the said application could not be heard on several occasions, the counsels requested the court to decide the same on the basis of the affidavits that had been filed. In his affidavit, Stephen Kariuki Ndiritu deponed that his co-accused had authorized him to swear the affidavit on their behalf. According to the deponent, he was arrested on 4th November, 2004 whereas the A2 was arrested on 12th November, 2004 while the A3 was arrested on 5th November, 2004. Eventually, all the three were arraigned in court on 8th May, 2006 after what the deponent described to be a humiliating ordeal in police custody that was apparently geared at extracting a confession. In his calculation, the A1 complained that they had been kept in custody for over 63 days. It is on the basis of the above that the three accused have complained that their fundamental rights under Sec. 72 (3) of the Constitution of Kenya had been violated. In support of their application, the applicants have relied on the following authorities:

- (1) Albanus Mwanzia Mutua –vs- Republic Crim. Appeal No. 120 of 2004**
- (2) Ndede –vs- Republic Criminal Appeal No. 1 of 1989**
- (3) Gerald Macharia Githuku –vs- Republic Criminal Appeal No. 119 of 2004**
- (4) James Njuguna Nyaga –vs- Republic Criminal Case No. 40 of 2007**
- (5) Ann Njogu & 5 Others –vs- Republic Misc. Criminal Application No. 551 of 2007**
- (6) Peter Mwanzia Kiilu –vs- Republic Misc. Criminal Application No. 26 of 2006**
- (7) Joseph Anhyango Abayo –vs- Republic Misc. Criminal Application No. 198 of 2007**

(8) David Muchangi Nyaga & Ibrahim Abdi Khadija –vs- Republic Criminal Case no. 110 of 2006

(9) The Constitution of the Republic of Kenya

On the other hand, the Republic has opposed the application while relying on the replying affidavit of Chief Inspector Lawrence Wahome. In the said replying affidavit, the deponent introduced himself as the investigating officer of this case. According to him, both A1 and A3 were arrested on 5th November, 2004 while the A2 was arrested on 12th November, 2004. Further to the above, he also deponed that all the three accused were arraigned in court to face trial for the offence of murder on 29th November, 2004. He conceded that there was a delay of only ten days in arraigning the accused persons to court. That apart, he termed as misleading the assertion that there was a delay of 63 days before the accused were taken to the court. In addition to the above, the deponent also stated that the accused were previously charged in High Court Criminal Case No. 159 of 2004 which has since been terminated. Besides the above, the deponent went into details on how he conducted the investigations. He was of the opinion that the investigations covered a wide area and dimensions in terms of issues to be analysed before any suspect could be taken to court.

From the above evidence on record, it is apparent that the accused were actually arraigned in court on 8th May, 2006. Unfortunately, the defence counsel never produced any evidence nor a copy of the relevant OB to prove that the accused were actually arrested on 4th, 12th and 5th November, 2004 respectively. It is also significant to note that those dates and 8th May, 2006 cannot be said to be over 63 days. Specifically that period is over 1½ years. Besides the above, the defence counsels have **not** denied the fact that the accused had earlier been charged in High Court Criminal Case No. 159 of 2004 that was later withdrawn. Apart from the above, the court has carefully considered the replying affidavit that was filed by Chief Inspector Wahome. No doubt, the said affidavit raised crucial and fundamental issues related to the investigations. Having considered the said replying affidavit, I hereby accept the reasons given by the Investigating Officer on the delay. Whereas, the court concedes that there was a delay of only ten days, I am of the considered opinion that the accused can be adequately compensated under Sec. 72 (6) of the Constitution of Kenya. The accused has been charged for a serious offence and hence the public interest and principles of justice and fair play dictate that the case should be decided purely on merit. That can only be achieved if the case is heard to its logical conclusion. Lastly, the court wishes to state that it is crucial and significance that there is need to consider all the constitutional provisions carefully so that a proper and fair interpretation is given to the same. That means that there must be a holistic approach to the interpretation of the constitution. In view of the foregoing, I hereby dismiss the application since the same has no merits. Apart form the above, I hereby direct that the defence case be heard on 15th and 16th July, 2009.

Ruling read, signed and delivered in open court in the presence of the accused:

Amendi for AccusedDefence Counsel and

MuleState Counsel

MUGA APONDI

JUDGE

23.6.09

Orders:

Assessors to be paid allowances.

MUGA APONDI

JUDGE

23RD JUNE, 2009